No. 80-581

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

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ALEXANDER L. STEVAS,
CLERK

Commonwealth Edison Company, Central Illinois Light Company, Dairyland Power Cooperative, Detroit Edison Company, Interstate Power Company, Lake Superior District Power Company, Lower Colorado River Authority/City of Austin, Minnesota Power & Light Company, Northern States Power Company, Upper Peninsula Generating Company, Wisconsin Power & Light Company, Decker Coal Company, Peabody Coal Company, Westmoreland Resources, Inc., and Western Energy Company,

Appellants,

against

State of Montana, Ted Schwinden, Governor of Montana, Helen J. Feaver, Director of the State Department of Revenue, and Maurice L. Brusett, Director of Administration and State Treasurer,

Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF OF THE WESTERN CONFERENCE OF THE COUNCIL OF STATE GOVERNMENTS AMICUS CURIAE

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BRIEF OF THE WESTERN CONFERENCE OF THE COUNCIL OF STATE GOVERNMENTS AMICUS CURIAE

Consent for the filing of this *amicus curiae* brief has been obtained by all the parties to this proceeding, and letters indicating the consent of these parties to the filing of this brief have been filed with the Clerk of the Court.

The Western Conference of the Council of State Governments, which comes before the Court as an *amicus,* is the formal organization of state legislators from the thirteen western states and three Pacific trust territories.[1]

The Western Conference (hereinafter also referred to as "state legislators" or "state officials") comes before the Court in general support of the State of Montana and the arguments made by her attorney general. The Western Conference, however, respectfully wishes to bring to the attention of the Court the arguments contained in this brief for the following specific reasons:

1. State legislators have primary responsibility in their states for the taxation of natural resources. Thus, the Western Conference and its members have obvious interests in the clarification of the federal constitutional law as it pertains to the natural resources of their states—including all non-coal energy minerals and other minerals as well.

2. Members of the Western Conference also share a common concern for the implications a decision of this Court in the instant case might have for *all* types of state taxation including gross receipts taxes, *ad valorem* taxes, income taxes, and special taxes such as transfer fees. For the Western Conference fears that, once a court looks beyond the legal incidence of any such tax to its ultimate economic incidence, all forms of state taxation will be in jeopardy of the same

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[1]The membership of the Western Conference includes the States of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming; the Territories of American Samoa and Guam; and the Commonwealth of the Northern Mariana Islands.

attack urged by the energy companies and utilities in this case.

Beyond these specific concerns, however, these state officials wish to address the Court on the implications this case has for federalism. By a strained invocation of a vaguely articulated national interest, appellants seek to nullify the responsible attempts of a sovereign state to plan for and meet the problems of its present and its future. These state legislators stress that such an interpretation would accomplish only a fundamental shifting of power away from the states and the people of these states and would thereby destroy the concept of states as laboratories of experimentation.

SUMMARY OF THE ARGUMENT

I. *Commerce Clause.* The Montana coal severance tax is a valid exercise of the state's sovereign power to tax in furtherance of the health and welfare of its citizens. Scrutiny under applicable principles of commerce clause adjudication fully supports this conclusion. The tax applies to an activity which takes place entirely within the State of Montana: the severance of coal from the earth. Under this Court's cases, therefore, this tax presents no justifiable commerce clause issues. Even assuming that the tax does reach the level of commerce cause inquiry, it satisfies that inquiry.

II. *Preemption.* There is no basis for a finding that the Montana coal severance tax has been preempted. The tax was enacted pursuant to the state's police power. Great deference should be given to state regulations which further the health and welfare of its citizens. A preemption challenge to a tax must be given careful scrutiny. None of the statutes cited by the appellants explicitly preempt state action in the field of severance taxation. The Montana tax does not conflict with federal regulations in this field. The

tax at issue is neither explicitly nor implicitly preempted by federal policies.

III. *Desirability of Judicial Abstention.* With knowledge of the Montana severance tax and of the arguments appellants make against it, Congress has not acted to impose a ceiling on the rate of such taxes. This fact alone should demonstrate the complex policy content of the issue and caution the Court to avoid interposing itself in the controversy. Additionally, it would be unmanageable for the judiciary to undertake commerce clause review of such taxes due to the difficulty of developing an appropriate standard, the difficulty of evaluating evidentiary matters, and the difficulty of formulating an equitable remedy.

IV. *Tenth Amendment Considerations.* Judicial invalidation of a state's severance tax, especially in the name of a vaguely articulated national policy, would do fundamental violence to original understandings of federalism. The state power to tax and to spend in pursuit of well-formulated plans to meet the present and future impacts of energy development are integral governmental functions. Rather than being nullified, these planning efforts speak of the potential contemporary viability of states in the federal system and should be honored as such.

ARGUMENT

I

THE COMMERCE CLAUSE DOES NOT NULLIFY A SEVERANCE TAX IMPOSED BY A SOVEREIGN STATE

Since 1975, the sovereign state of Montana has imposed a 30 percent tax on coal severance. Coal producers and utilities are challenging this tax. They are not challenging the state's power to impose the tax; rather, they are challenging the amount of the tax. Appellants' Brief at 49-50.

At issue is the constitutionality of Montana's sovereign taxing power under the commerce clause of the United States Constitution, article I, section 8: "Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

A. The Act of Severance is an Inherently Local Activity Unrelated to the Ultimate Destination of the Natural Resource in the Stream of Commerce

Many cases support the proposition that Montana's taxation of its coal does not rise to the level of commerce clause scrutiny because the activity taxed, the severance of coal, is an activity completely contained within the State of Montana.

While the energy companies in this case have attempted to cast doubt upon the ability of any local activity to be beyond the reaches of the commerce clause, Appellants' Brief at note * *, p. 23, the logic of a severance tax on just such an activity is correct. As one court has indicated,

> The excise tax is on the act of severance, and the production, of an Oklahoma resource. Severance can occur only once and in this state. The levy is prior to entrance of any gas into interstate commerce and is on *all* gas so severed and produced without regard to subsequent entrance into either intra or interstate commerce. (emphasis in original)

Post Oak Oil Co. v. Oklahoma Tax Comm'n, 575 P.2d 964, 967 (Okla. 1978). Thus, the severance tax applies regardless whether the coal fuels generators in Houston, warms homes in New England, is used for rock gardens in Helena, or is simply stored indefinitely 50 feet from the mine mouth.

This Court has long recognized the local character of the severance of coal, other resources, and other parallel activities. The trilogy of older cases by this Court, *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922), *Oliver Iron*

Mining Co. v. Lord, 262 U.S. 172 (1923), and *Hope National Gas Co. v. Hall,* 274 U.S. 284 (1927), bespeak this understanding. Despite appellants' argument that this clarity has tarnished over time, its validity was reaffirmed in *Alaska v. Arctic Maid,* 366 U.S. 199 (1961), a case involving state taxation of a renewable resource activity. In that case, Alaska imposed a license tax upon freezer ships which processed salmon caught in Alaskan territorial waters and then took the frozen salmon to Washington State to sell. The owners of the freezer ships argued that they operated in interstate commerce and that, therefore, Alaska had exceeded its authority in imposing such a tax upon them. This Court responded that the taxable event in question was neither the catching nor the freezing of the fish *per se* but prosecuting the business of freezer ships and other floating cold storages.

In referring to *Toomer v. Witsell,* 334 U.S. 385 (1947), and *Oliver Iron Mining Co. v. Lord* as dispositive, the Court spoke about the incidence of the tax and its relationship to the interstate market:

> Here as there the tax is an occupation tax. Here as there, the market for the product obtained locally is interstate, the taking being a step in the process leading to an interstate market. In both the local product is promptly loaded for interstate shipment. But in each, there is a preliminary local business being conducted—an occupation made up of a series of local activities which the state can constitutionally reach.

Id. at 204.

Montana finds herself in just this same position—forced to defend the assertion of its sovereign taxing power over the severance of coal which takes place entirely within Montana. *Cf. Cities Service Gas Co. v. Peerless Oil & Gas Co.,* 340 U.S. 179 (1950); *Hope Natural Gas Co. v. Hall,* 274 U.S. 284 (1927). Yet, these state legislators are confident that the Court will once again reaffirm the local

nature of severance and thereby demonstrate comity to the states of this Nation in their legitimate exercise of their taxing powers.

B. On its Face, a Severance Tax Such as Montana's Satisfies the Important Concerns of Commerce Clause Inquiry

The act of severance is one which can fairly be called intrastate. Even if this Court were to look beyond the taxed activity itself to determine if there was an effect upon interstate commerce, *Wickard v. Filburn,* 317 U.S. 111 (1942), any identified effect would not necessarily be forbidden. The question then would be whether the burden on interstate commerce clearly outweighs the state's legitimate purpose in regulating or taxing the activity.

This Court has provided a four part test to determine whether such an impermissible burden exists. *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977) (rejecting the proposition that the interstate commerce is immune from taxation). The elements of the test are: (1) whether the taxed activity has a nexus with the taxing state; (2) whether the tax is fairly apportioned; (3) whether the tax discriminates against interstate commerce; and (4) whether the tax is fairly related to the benefits provided the taxpayer. 430 U.S. at 279.

As the following indicates, the Montana severance tax, on its face, satisfies each of these four criteria. More importantly, a factual inquiry by a court would provide little, if any, additional information to aid in the application of this test. In this case, such inquiry soon leads to legal conclusions; thus, as a matter of law, Montana's severance tax fully satisfies the concerns behind the commerce clause.

1. *The Taxed Activity has an Inherent Nexus with the Taxing State*

The act of severance in and of itself constitutes the appropriate nexus with the taxing state. Severance of a

natural resource can only occur in one location; the Montana tax is applied solely to the coal mined within its state borders. *See Western Livestock v. Bureau of Revenue,* 303 U.S. 250 (1938).

2. *The Severance Tax is Fairly Apportioned*

Related to the question of nexus with the taxing state is the additional concern that the tax be fairly apportioned between activities which take place within the taxing state, subject to tax, and those activities which, because they take place in another state, are beyond the state's taxing power. This second prong of the *Brady* test is satisfied due to the fact that, since severance is an activity which can only take place in Montana, no other state can legitimately tax it.

3. *The Severance Tax is Nondiscriminatory*

The Montana severance tax does not discriminate against interstate commerce in that the State applies this tax even-handedly to all who sever coal regardless of its ultimate destination. Severance of coal for local use is taxed at a maximum of 30 percent as is coal destined for the interstate market. If the fact that more coal leaves the state than remains can justify terming this tax burdensome on interstate commerce, then such would also be the case with various taxes on Washington's timber, Alaska's salmon, California's grapes, New York's stock exchange transactions, Florida's tourist industry, and many other variants of wealth, which due to the climate, geography, or accidents of fortune originate in that particular state and are exported to others.

Over the years, states have pursued many types of policies which, deliberately or not, have impermissably burdened interstate commerce. Many of this Court's cases have given careful consideration to the limits the commerce clause imposes on state legislation; and no single formula has emerged which can be applied to all situations.

One test that has been applied was recently rearticulated in *Hughes v. Oklahoma,* 441 U.S. 322 (1979), quoting the Court's earlier decision in *Pike v. Bruce Church,* 397 U.S. 137, 142 (1970):

> "[W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." (Citations omitted)

Id. at 331.

The Montana taxing statute meets these criteria. It regulates evenly and is directly related to legitimate state purposes—funding the costs to the state of the coal mining and the other services necessitated thereby.

A second approach of the Court has been to invalidate state regulations that give preference to local activity over interstate activity or prevent out-of-state business from competing on an equal basis with domestic firms. *See, e.g., Baldwin v. Seelig,* 294 U.S. 511 (1935); *Dean Milk v. Madison,* 340 U.S. 349 (1951); *Pike v. Bruce Church,* 397 U.S. 137 (1970); *Toomer v. Witsell,* 334 U.S. 385 (1947); *Baldwin v. Fish & Game,* 436 U.S. 371 (1978).

The Montana tax is not designed to, nor does it achieve, this prohibited effect. Montana does not prefer its residents over nonresidents, benefit them over out-of-staters, protect them against out-of-state competition, prevent their coal from going wherever there is a willing buyer, or regulate or exempt from regulation business based on its local or interstate character. Thus, the Montana tax does not run

afoul of any of these concerns: out-of-state business is required to do no more than is equally expected of domestic producers of coal.

A third major group of cases concerns challenges to state regulations which attempt to curtail exportation of resources or products. *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *H. P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525 (1949). Thus, a state cannot isolate itself from the economy of the nation; economic protectionism has been held to be *per se* invalid. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Yet what is found to be protectionist may depend upon the legitimacy of the state objectives in enacting the particular regulation. For example, in *Parker v. Brown*, 317 U.S. 341 (1943), a California state agricultural regulation fixing the price of raisins grown and sold in California and shipped throughout the nation and the world was upheld by the Court. The purpose—to maintain raisin prices by restraining the competition of producers in the sale of their crops—was found to be a legitimate function of the state government; the means by which this purpose was achieved, the raisin marketing program (price regulation), was upheld to be a valid exercise of state power.

The present case is analogous. Montana has a valid state interest in regulating the economic affairs of the state. No one is in a better position than the Montana state government to assess the economic needs and allocate the resources of the state. They have done so in an even-handed, nondiscriminatory manner. In the case at bar, as in *Parker*, a legitimate state objective is being accomplished by nondiscriminatory means—rationally and reasonably related to the ends to be obtained.

Another Montana case involving a state license tax was *Baldwin v. Fish & Game*, 436 U.S. 371 (1978), where in the Montana State elk hunting licensing tax provisions were upheld even though nonresidents were charged $225 to hunt elk compared with a $9 service charge for Montanans.

Despite facial discrimination in favor of locals, the statutory scheme was considered an economic means not unreasonably related to the preservation of a finite resource—a substantial regulatory interest of the state. The Court reasoned that residents pay the cost of the elk hunting program through their taxes; nonresidents should also shoulder their share. Thus, discriminatory regulations have survived constitutional challenge when a legitimate state purpose is reasonably accomplished. It follows that Montana's severance tax scheme, which is not discriminatory on its face and utilizes the revenue for even more important state purposes, fares very well under this line of reasoning.

Similar commerce clause and equal protection challenges were rebuffed by this Court in a case decided earlier this year. *Minnesota v. Cloverleaf Creamery Co.*, ... U.S. ...., 49 U.S.L.W. 9111 (1981). In a reasonable attempt to curtail the wasteful use of petroleum products in the production of plastic containers, the Minnesota Legislature enacted a statute banning the retail sale of milk in plastic, nonreturnable, nonrefundable containers but permitting such sale in other kinds of nonreturnable, nonrefundable containers. The state, perhaps even relying on erroneous information, was balancing, in a manner only a legislature can, the complex trade-offs inherent in any public policy which encourages the use or protection of one resource over another.

The commerce clause question was whether the statute was basically a protectionist measure or whether it be fairly viewed as a law directed to legitimate local concerns with only incidental effects upon interstate commerce? This Court answered:

> Minnesota's statute does not effect "simple protectionism" but "regulates even-handedly" by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the Containers, or the sellers are from outside the State.
>
> * * * * *

> Since the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota Act is "clearly excessive in relation to the putative local benefits" *Pike v. Bruce Church, Inc., supra,* 397 U.S. at 142. We conclude that it is not.
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> • • • • •
>
> In *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978), . . . we stressed that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause. (citations omitted)

49 U.S.L.W. at 4115-16.

Appellants have argued that the tax is tailored to fall on interstate commerce. Appellants' Brief at 27. Rather, the tax falls on interstate commerce only to the extent that it is passed along by the appellants to their purchasers and so on to the utility consumers. The State of Montana did not decide where the coal was going or upon whose shoulders the tax would ultimately come to rest; appellants themselves did.

The fact that the coal subsequently enters interstate commerce does not make the tax somehow tailored to fall there. The same argument was made and rejected in *Alaska v. Arctic Maid,* 366 U.S. 199 (1961). The Montana tax is applied evenly regardless of the ultimate destination of the coal: "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, es-

tablish a claim of discrimination against interstate commerce." *Exxon v. Maryland,* 437 U.S. 117, 126 (1978).

4. *The Tax is Rationally Related to the Services Rendered the Taxpayer.*

No taxpayer can expect an accounting from his government as to the equivalence between the taxes he pays and the benefits he receives from the government. Such an accounting is not available both because of economic futility in any attempt to undertake such calculations and because of the nature of government itself. Government exists principally because it provides certain services, often referred to as "public goods," which, by their very nature are not merchantable, cannot be priced, and cannot be sold or exchanged through some market mechanism. These are the benefits of a civilized society and an orderly government, to which the Montana Supreme Court referred, *Commonwealth Edison Co. v. Montana,* 615 P.2d 847, 856-57 (1980), and of which appellants make so light.

Additionally, Montana has and will provide to appellants, their employees, and many of their shareholders the more tangible benefits of schools, health services, parks, transportation, police and fire protection, environmental protection, and the numerous other services provided by contemporary government. Only the Montana Legislature has the constitutional responsibility of undertaking this complex calculus. By its very nature, the decision is a political one; and the judiciary should give great deference to the political outcome that has been achieved.

Thus, the Montana severance tax completely satisfies this, the fourth, criteria set forth in *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977).

In summary, appellants are asking that the Montana's well-considered judgment as to its economic plans, needs, and priorities be invalidated. In essence, they push for further erosion of state and local decisionmaking and a concomitant solidification of power at the national level.

For if the power to tax is in some way limited by other authorities, is it not taken away? The commerce clause was not meant to so substantially intrude on the sovereign taxing power of the states.

II

THE MONTANA SEVERANCE TAX HAS NOT BEEN PREEMPTED BY FEDERAL LAW

The commerce clause gives Congress power to regulate what is concededly interstate commerce. Where there has been federal legislation which neither permits nor prohibits state laws in the field, the Court must determine as a matter of law whether the Congressional statutes authorize or forbid the state action.

Preemption of state statutes by federal regulations can occur in a number of ways. Explicit preemption occurs when Congress has declared its intent to be the sole regulator in the field. Preemption also exists where the state and federal regulations conflict. And preemption is found where the intent of Congress to regulate the entire field can be ascertained—sometimes by the pervasiveness of the federal regulations in the particular field. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[2]

A. There Has Been No Explicit Preemption of the Montana Severance Tax by Federal Statutes

There has been no explicit preemption of the Montana coal severance tax by federal statutes; indeed, several statutes speak to the contrary. For example, the Clean Air Act, 42 U.S.C. § 7402, an act cited by appellants, en-

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[2]Cases in which preemption has been found have shown a clear Congressional intent to preempt state regulations in the legislative history of the Act. *See, e.g., Mobil Oil v. Dubno*, 492 F.2d 1004 (1980) (history of the Emergency Petroleum Allocation Act showed an intent to preempt state regulations); *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979) (—invalidated a New Mexico energy tax on the privilege of generating energy within the state—).

courages cooperative activities by state and local governments. In *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960), the Court held that local regulations were not preempted by the Act; and, in fact, the intent of Congress was to encourage state regulations complementary of the purposes of the Act. What this Court said in *Huron* also speaks well to the issues raised in this case:

> [I]t must be borne in mind that the Constitution when "conferring upon Congress the regulation of commerce, . . . never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution (citation omitted)" . . . . State regulation based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand. (citations omitted)

362 U.S. at 443.

And, while appellants' attempt to diminish the importance of section 32 of the federal Mineral Lands Leasing Act of 1920, 30 U.S.C. § 189 (1976), it strains comprehension to ignore the clear recognition there afforded the states in exercise of their taxing power.

B. The Montana Severance Tax Does Not Frustrate Federal Law

Appellants have urged that the Montana coal severance tax is preempted by "national policies" with respect to the production and use of coal. In support of their argument, they simply cite numerous federal statutes. Appellants' Brief at note *, p. 5.

Simple enumeration does not necessarily equal pervasiveness; and general recitations of national policy do

not indicate federal preemption of Montana's policy to impose a severance tax.

While the cited federal statutes deal with energy development, conservation, and federal land and mining policy, the Montana regulation of concern here is a state-imposed tax on the severance of coal—an exercise traditionally considered to be part of a state's broad police power. The cornerstone of state government is the power to tax. Therefore, no less than a clear and manifest intent on the part of Congress must be shown in order to preempt the state's taxing function. In referring to the great deference so accorded state police power, this Court has stated, "Congress legislated here in a field which the States have traditionally occupied (citation omitted) . . . so we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Co.*, 331 U.S. at 230. No such clear and manifest statement has been demonstrated so as to lead this Court to nullification of Montana's tax.

C. Federal Policies Are Not Single-Purpose; Indeed, There Are Multiple Policies Concerning Energy Development, Energy Conservation, Environmental Protection, Land Reclamation, and Other Purposes

Maximization of coal production at all costs is not the sole national policy. National policies in this area are not single faceted; they are multipurposed. These laws reflect the need to balance a variety of competing interests. For instance, the federal coal management program attempts to balance energy production goals with a concurrent interest in maintaining social and environmental integrity. Coal burning itself presents many environmental and health hazards. Pertinent laws contain provisions for research and development in these areas—provisions for reclamation and protection of the environment. And, in fact, most all of the Acts cited have some provision for state, local and regional cooperation in these areas.

The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* (Supp. II 1976), is an example of how one statute can mandate multiple and potentially conflicting goals. Some of the purposes of that statute are to:

> (a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;
>
> • • • •
>
> (d) assure that surface coal mining operations are so conducted as to protect the environment;
>
> (e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations;
>
> (f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and *strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy;* . . . . (emphasis added)

30 U.S.C. § 1201.

One of the very things that Montana is trying to accomplish with its taxing policy is to implement complimentary federal as well as state objectives while at the same time to provide for the orderly growth of the coal industry. *See, e.g.,* MONT. CODE ANN. § 15-35-102(d) (1979). Montana has seen the scars left by uncontrolled exploitation of a nonrenewable resource both in their state and in the southeastern United States. The state has attempted legislation which will complement federal policy, insure stable growth for Montana, and avoid the pitfalls of uncontrolled resource exploitation.

While attempting these purposes, Montana's severance tax rate still imposes only about the same or less of a burden on other states than severance tax rates on oil or gas,

from the perspective of the consumer who uses the end product. This is true for two reasons. First, coal in general and western coal in particular is cheaper per BTU than oil or gas. The national average cost per million BTU of coal in December 1979 was $1.95, $3.95 for residential fuel oil and $1.83 for natural gas. And second, while some products of crude oil and natural gas are used in a fairly direct manner, coal is used almost exclusively in power plants to generate electricity. The cost of coal, therefore, in the end product is small as compared to oil and natural gas products. Consequently, the impact of the severance tax is less. The Library of Congress Congressional Research Service, Energy: Limiting the Coal Severance Taxes (Issue Brief Number IB 80060, June 24, 1980).

If the Montana severance tax is preempted by "national energy policies," what about other cost components of coal-generated electricity? Transportation costs far outweigh coal severance tax costs per BTU in the consumer's utility bill. Do Interstate Commerce Commission approved tariffs thereby impermissibly frustrate Congress' will? A dollar's worth of electricity sold to a Minnesota consumer includes a four cent Minnesota sales tax, twice the amount of the severance tax. Article by R. Clawson, Billings Gazette (Jan. 1980). Would the Minnesota sales tax similarly be subject to preemptive challenge?

The Montana coal severance tax has not been explicitly preempted by federal legislation. Congress has not indicated its intent to dominate the field of natural resource severance taxation either implicitly or through a pervasive scheme of tax regulation. Furthermore, the Montana coal severance tax is not only *not* in conflict with federal policies but, in fact, complements and furthers federal policies in many areas by the use to which tax proceeds are put.

Montana attempts only to exercise its sovereign powers to tax and spend. The tax is rationally related to legitimate state public power objectives; and, absent more than a

recitation of general national policies, the Montana coal severance tax should be accorded a strong presumption of constitutionality.[3]

III

THE COURT SHOULD EXERCISE JUDICIAL RESTRAINT IN THIS CASE

A. As a General Principle, the Court Should Defer to the Political Branches of Government for the Resolution of Disputes Concerning Issues of Federalism

A leading proponent of judicial restraint concerning constitutional issues respecting the ultimate power of the national government vis-à-vis the states has argued:

> The functional, borderline question posed by federalism disputes is one of comparative skill and effectiveness of government levels: in a word, an issue of practicability. Whatever the [judiciary's] special competence in adjudicating disputes over individual rights, when the fundamental constitutional issue turns on the relative competence of different levels of government to deal with societal problems, the courts are no more inherently capable of correct judgment than are the companion branches.

J. Choper, "The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review," 86 YALE L.J. 1552, 1556 (1977).[4] Such deference to Congress con-

[3] "But it will not follow from this doctrine (the Supremacy Clause) that acts of the larger society which are *not* pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies (here the States), will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such." THE FEDERALIST NO. 33, at 204 (Mentor Ed. 1961) (A. Hamilton).

[4] Choper would also argue that judicial review would be appropriate "over challenges to state encroachments on national power." "The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review," 86 YALE L.J. 1552, 1577 (1977). His concerns there enumerated, *id.* at 1585-86, are not relevant in the instant case. We have argued generally that taxpayers such as

cerning the validity of the Montana severance tax rate should follow in this case.[5]

Several decisions of this Court suggest the wisdom of judicial restraint when complex issues of political power and sovereignty present themselves before the Court. In these instances, this restraint is justified as a "consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority" and "inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement. . . ." *Rescue Army v. Municipal Court,* 331 U.S. 549, 571 (1947). Thus, in a decision in which the Court was faced with a judicial claim by a state that a Congressional statute had encroached upon its

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appellants can have an effective political presence in the taxing state. More specifically, as the Montana Supreme Court adequately demonstrated, appellants, vocalizing their interpretation of Congress' national energy policy, have been active in Montana state politics. *Commonwealth Edison Co. v. Montana,* 615 P.2d 847, 857 (Mont. 1980). These same companies have been forceful in bringing these same issues to the attention of Congress. During the last session of Congress, representatives of numerous coal companies and utilities testified at hearings on bills to place a ceiling on state coal severance taxes. Witnesses included representatives of many of the appellants: for instance, Commonwealth Edison Co., Decker Coal Co., and Detroit Edison Co. And, in spite of appellants' dire warnings by such witnesses as to how Congress' desires for energy independence are threatened by the Montana tax, Congress remained silent.

[5]While Choper would suggest that states are protected, through the structuring and political processes of the Congress and the Presidency, from excesses of the national government against the sovereign prerogatives of the states, Choper, *supra* note 3, at 1600, this *Amicus* is reluctant to concede to the desirability of judicial deference in all federalism disputes. Even with the numerous restraining mechanisms available to states in the Congress, *id.* at 1560-77, a state or region of states might conceivably be victims of unrestrained nationalism supported by a vast majority of the states who might not possess the unique value of concern to the sole state or region of states. In such instances, this *Amicus* would seek recourse to the courts for redress of this encroachment.

power, the Court responded that its own power under article III extends only to proceedings of a justiciable character:

> In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, . . . and it is plain that that question, as it is thus presented, is political, and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.

Massachusetts v. Mellon, 262 U.S. 447, 483 (1923). Similarly, these state legislators argue that, when Congress has shown no preemptive intent, similar deference be given to their actions.

The Congress must be imputed with knowledge during the last five years of Montana's tax and of the arguments the energy companies have made concerning its validity. Indeed, these views were presented before Congress during the last session, and several of appellants were active in support of legislation curtailing such taxes. The following is certain: with full knowledge of purported difficulties with the severance tax, Congress has not seen fit to act.

While no party to this action or court could presume to divine the governing intent of Congress in its actions (or, in this case, its failure to act), numerous sound policy arguments might be advanced to explain Congress' reluctance to strike out at the Montana tax. Inaction may well be explained by the success of the formal involvement of individual state delegations in the Congressional process and by the state government backgrounds of many members of Congress who might well have interpreted severance tax limitation as threatening damage to their own conception of the federal scheme.

Congressional restraint might also be explained by a shared belief among many of its members that the Mon-

tana tax, rather than frustrating Congressional energy policy, actually serves that policy well. If the tax increases the price of Montana coal in comparison to the price of coal produced in other states, this result may serve to encourage the development of coal resources in other states and to avoid over-accelerated development in and reliance upon the resources of one state. Congress may well have been impressed by the thoughtful and inventive plans of the state to allocate the tax revenues in mitigation of the present social impacts of energy development and the certain impacts that will accompany the inevitable end of coal mining in that state. Such state action lessens the need for federal impact assistance. Rather than an indication of "resource profiteering" to be vindicated, members of Congress may well consider the Montana tax and trust as a model to be left standing and, indeed, emulated in other States.

Thus, the argument of the energy companies as to some disruption of the national energy scheme has failed on two grounds. First, as a matter of the law of preemption, *supra* at 17 *et seq.*, these appellants have failed to show either explicit or substantial frustration of some well-articulated and coherently developed single energy policy. Second, in this section, we have seen that, despite long-term knowledge of the supposed evils inflicted upon the appellants by the state, Congress has not seen fit to curtail the Montana tax. While many plausible explanations for such inaction can be advanced, this *Amicus* cautions the Court against the self-serving attempts at Congressional mind-reading in which appellants have carelessly engaged. Rather, it is enough for this Court to take cognizance of the simple fact that, for whatever reason, Congress has not acted; and this fact alone should support the general principle of judicial deference in this case.

One argument of appellants is that potential excesses of a high tax which is exported to other states is unrestrained by the political forces of the taxing state. That is to say,

there is no local constituency to restrain an excessively high tax.

In making this argument, however, appellants over-simplify the political system in which taxation policy is formulated. Appellants are not isolated taxpaying entities whose interests are subjected to the whim of the home state. Appellants are not the victims of a home court advantage. These energy companies have sophisticated attorneys, experts, and governmental affairs staffs who influence the development of state policies. More importantly, these companies have Montana employees, shareholders, and contractors who are all citizens of the State, have a stake in its economic and social health, and have access to the political process in which these taxation decisions are made.

B. Were the Commerce Clause to Apply to States' Severance Taxes, Such Inquiry Would Bring upon the Judiciary a Complex Task of Unmanageable and Immense Proportions

For the Court to adjudge the Montana tax as an impediment to interstate commerce would invite litigation of numerous economic issues surrounding state taxation. Much of this litigation would end up before this Court for review as to the correctness of the application of constitutional principles by lower courts.

This is not a simplistic caution that an adverse ruling would "open the floodgates of litigation." Rather, the caution is to suggest that the difficulties of sculpturing an adequate standard, of undertaking sufficient factfinding, and of developing an equitable remedy all argue strongly against the Court interposing itself deeply in this complex economic field. The following delineates these caveats:

1. *The Difficulty of Developing an Appropriate Standard*

By what standard would the Court consider state taxation of its natural resources as resulting in an unac-

ceptable burden on interstate commerce? Two threshold values might be used to trigger further inquiry: (a) taxation at a certain *rate* or beyond; or (b) instate consumption of the taxed good at a certain level or less.

At first glance, each standard might promise to be workable. A coal tax at x percent or more would be inherently suspect, as would in-state consumption of x percent or less. Yet, when placed in a total economic context, both standards would prove unmanageable. While a 50 percent tax on coal would seem high for a state having diverse mineral wealth, is it similarly suspect in a state having no other mineral wealth or, for that matter, no other real wealth at all?

Similarly, a threshold of 10 percent or less instate consumption of the taxed commodity might seem a legitimate gauge for judicial concern. What if the producing state lacks the industrial infrastructure to make use of the resource? What if consumption and population patterns periodically change that proportion? How effective and credible is a standard that has the same erratic movement as the Dow Jones averages?

Neither standard promises the stability or predictability that is legitimately expected of a rule of law. State legislatures would be hard pressed to structure a tax given these uncertainties.

2. *The Difficulty of Evaluating Evidentiary Matters*

Were an adequate constitutional standard formulated by the Court, its application by trial courts to the complex economic realities would present another dimension of difficulties. If the standard were framed in terms of the benefits provided the taxpayer by the state, the question would be how close to an equilibrium between the amount of tax and the benefits provided would be sufficient. Could the tax revenue and value of benefits vary by 10 percent, 20 percent, 50 percent? Is a fictitious entity, such as a cor-

poration, the only beneficiary? Or does the summation of benefits include employees, shareholders, suppliers, contractors?

And, while states have been given discretion to fashion different levels of taxation for different goods and commodities, the inequities between the taxation of coal, as one energy resource, and oil and gas, as similar energy resources, might be too much to be allowed to continue. While the actual rate of tax on coal might be higher (as it is in Montana) than oil and gas, the rate, in terms of BTU's of energy, is quite similar.[6] Does that similarity validate the coal tax or does it constitutionally call into question the validity of all severance taxes? And, by what other equally valid dimensions or characteristics might the variety of severance taxes be compared? Does the validity of the tax also depend on how much can be shifted forward to the consumer; or how much it adds, in relation to freight and processing, to the total price?

3. *The Difficulty of Formulating an Equitable Remedy*

A difficulty also results when one contemplates an adequate remedy to redress appellants' supposed grievances. While these appellants concede the constitutionality of a state severance tax and challenge only the rate of the tax, this concession can be of little help to the judiciary in the resolution of the case.

Appellants indicate that they have paid under protest $135 million as a result of Montana's tax, and the total collections from appellants and other coal producers similarly situated is estimated to be $150 million as of July 1, 1980. Data of Montana Legislative Council.

What equitable remedy can a court fashion in this instance? One possibility would be to declare the tax invalid and order the return to the producers of all collection

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[6] See text at 23.

made under protest; but this result would unjustly enrich the producers and seriously prejudice the state in terms of the impacts of coal mining since the effective date of the tax.

Thus, absent a judgment returning all tax collections to the energy companies, this Court or the trial court would have to fashion a rate for the tax reasonable in light of commerce clause considerations. One manner by which a court could determine such reasonableness would be on the basis of the costs accruing to the States as a result of mining so as to satisfy appellants' argument of equivalence.

Does a court really want to undertake the extensive microeconomic analysis that inquiry would entail? What special political or economic insight can this Court or the trial court claim to aid in the development of this reasonable tax rate? Can this standard of reasonableness be applied to all coal mining in the Rocky Mountain States? In the West? Throughout the nation? Must the Court look to the content of Congressional proposals, though unsuccessful, to limit the tax? If such Congressional guidance is sought, is not that inquiry alone sufficient justification for judicial abstention from determining the rate?

Presuming a rate of reasonableness could be calculated, and revenues beyond the yield of that rate had been collected, who are the proper recipients of the refund? If the refunds were made to the *de jure* taxpayers, would we be surprised to find these energy companies arguing different theories of economic incidence to thereby defeat the claims of utilities and consumers in other states? Would a court have to assume jurisdiction over all these persons to assure fair distribution of this refund? Do not these difficulties of fashioning a sufficient and just remedy further reinforce the desirability of judicial abstention in this case?

IV

APPLICATION OF THE COMMERCE CLAUSE TO SEVERANCE TAXES OF STATES IS PREVENTED BY SOUND PRINCIPLES OF FEDERALISM AND THE TENTH AMENDMENT

A. Judicial Invalidation of a Nondiscriminatory State Tax on a Uniquely Local Activity, in this Instance, the Act of Severance, Would Undermine Fundamental Characteristics of our Federal System

In view of the fact that this case has found its way to this most important forum, the fundamental nature of this Union must again be stressed: the national government is one of limited, though often, concurrent powers. The presumptions inherent in the system favor action and competence of each sovereign within its sphere.

While the Constitution attempted to remedy many of the fundamental failures (especially in terms of commerce among the states) of the earlier Articles of Confederation, none of the documents surviving and resulting from that historic Convention in any way support the result the energy companies urge here: the invalidation of a nondiscriminatory tax on a discretely local activity.

What available historic documents do disclose is directly to the contrary. Given the 190 year interval between the writing of *The Federalist Papers* and the origin of this case, how much clearer guidance could those authors have provided this Court in consideration of the instant case than the following:

> Suppose, by some forced construction of its authority (which, indeed, cannot easily be imagined), the federal legislature . . . should undertake to abrogate a land tax imposed by the authority of a State; would it not be . . . evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, *which its Constitution plainly supposes to exist in the State governments?* If there ever should be a doubt on this head, the credit of it will be entirely due

> to those reasoners who, in the imprudent zeal of their animosity to the plan of the convention, have labored to envelop it in a cloud calculated to obscure the plainest and simplest truths. (emphasis added)

THE FEDERALIST NO. 33, at 204 (Mentor Book Ed. 1961) (A. Hamilton).

Publius continues in his commentary to characterize this "compound republic" as consisting of parallel sovereigns, each entitled to the supremacy of its laws within its proper sphere. Specifically, concerning the power of States to tax in areas also subject to Congressional exercise of its enumerated powers, he indicates:

> Though a law, therefore, for laying a tax for the use of the United States would be supreme in its nature and could not legally be opposed or controlled, yet a law for abrogating or preventing the collection of a tax laid by the authority of a State (unless upon imports and exports) would not be the supreme law of the land, but a usurpation of power not granted by the Constitution. As far as an improper accumulation of taxes on the same object might tend to render the collection difficult or precarious, this would be a mutual inconvenience, not arising from a superiority or defect of power on either side, but from an injudicious exercise of power by one of the other in a manner equally disadvantageous to both. . . . (emphasis in original)

If these admonitions were so clear as to the interrelationship of the two sovereigns concerning the same governmental function, to-wit: taxation; can any one reasonably suggest that the state taxing power is of any less stature when confronted with an interpretation of the commerce clause?

These conceptions of federalism are not simply antiques surviving to a new and different age. The political and economic value of such decentralized decisionmaking has been recognized by contemporary authors. Thus,

> if efficiency were the principal objective, national energy policy could best be effectuated by the consolidation of the regulatory function at the federal level.
>
> Equally important considerations argue against such consolidation. The impact of energy policy decisions upon the quality of life may be significant. Such decisions well may be better left at the state level where pronounced local concerns can be accommodated or some suitable compromise developed. State governments may be more prepared to accept their own mistakes than the mistakes of the federal government. In the long term, the different decisions made at the state level may result, through a trial and error process, in the identification of the most appropriate course of action which a centralized, and hence less diverse, system might discover only belatedly, if at all. *It may be more important to preserve the values of federalism than to create a symmetrical and efficient energy regulatory mechanism.* (emphasis added)

10 NAT. RESOURCES LAW. 717, 717-19 (1978).

B. Nullification of the Montana Coal Severance Tax Would Violate the Tenth Amendment

It should come as no surprise to the Court that these state legislators believe a reversal of the Montana Supreme Court's decision would place the federal judiciary at the threshold of substantial interference with the "integral governmental functions" protected by this Court's decision in *National League of Cities v. Usery,* 426 U.S. 833 (1976). And, while commentators have faulted the Court for the potential ambiguity in the scope of this guarantee, there can be no doubt that, if state sovereign powers are to be protected in any case by the penumbra of *National League of Cities,* they are to be protected in this case.

National League of Cities suggests two criteria for determining whether a state governmental function is pro-

tected by the Tenth Amendment against the potential application of federal power under the Commerce Clause. These criteria are whether the threatened activities are important activities or whether those activities are traditionally undertaken by state and local governments. In the former category, policy, fire, and other public safety functions are mentioned. By this Court overruling *Maryland v. Wirtz,* 392 U.S. 183 (1968), the implication is that educational and health services also have protection. Traditional governmental activities, those not typically provided by the private sector, add sanitation and parks and recreation services to the list. The unifying standard seems to be those "activities [that] are typical of those performed by the state and local governments in discharging their dual functions in administering the public law and furnishing public services." 426 U.S. at 851.

Both the taxing and spending powers of the state are threatened in this action, and no other challenge could be so disruptive of the state's sovereign authority. The ability of the elected state legislators to enact a nondiscriminatory tax on a typically local activity would always remain subject to review by a federal court on some theory of unconstitutionality (*e.g.,* the allegation of discrepancy between the amount of taxes paid and benefits received).

The implications for the state spending power are equally frightening. Reviewing the failures of earlier mining booms in Montana, the present generation of state officials sought to avoid those pitfalls. Its elected officials chose to dedicate the proceeds of the severance tax for present and future benefit. A trust of constitutional stature was created by the voters to provide a replacement source of wealth for when the coal plays out. Rather than the soiled schemes of "resource profiteers," this planned approach toward development demonstrates rational choices and the highest level of responsibility that could be desired of our public officials. In so acting, the state has diminished its economic reliance

on federal assistance and indicates that one state, rather than deferring to Washington for a solution, has sought to master its own fate. Thus, to paraphrase this Court, if Congressional action or the commerce clause may be used to eliminate such a responsible exercise of basic state governmental powers of taxing and spending, "we think there would be little left of the States' 'separate and independent existence.'" 426 U.S. 851 (1976), *quoting Coyle v. Oklahoma,* 221 U.S. 559, 580 (1911).

CONCLUSION

For the reasons argued in this Brief, the Western Conference, representing the state legislators of the Western States and territories, respectfully urges the Court to affirm the decision of the Montana Supreme Court and, in so doing, reaffirm the traditional principles of federalism in which state governments need and do play a vital part.

Respectfully submitted,

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